Filed 4/8/19 P. v. Fuggins CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. MARVIN EARL FUGGINS, Defendant and Appellant.	B289629 (Los Angeles County Super. Ct. No. TA143409)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kelvin D. Filer, Judge. Affirmed.

Jennifer Hansen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Michael C. Keller, Eric J. Kohm and Zee Rodriguez, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Marvin Earl Fuggins of unlawful firearm possession, carrying a loaded and unregistered firearm in a public place, and unlawful possession of ammunition. Fuggins argues the trial court erred in denying his motion to suppress evidence seized during a warrantless search of his car. We conclude the odor of marijuana coming from the car and Fuggins's admission there was marijuana in the car gave law enforcement probable cause to search Fuggins's car under the automobile exception to the warrant requirement, even after the approval of Proposition 64, the Control, Regulate and Tax Adult Use of Marijuana Act. Therefore, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Sheriff's Deputies Search Fuggins's Car and Seize a Gun*

Fuggins was driving a car with two of his cousins as passengers. Sheriff's deputies stopped Fuggins for driving without a seatbelt. Deputy Christopher Booth-Mahood "could smell marijuana coming from inside the vehicle." The deputy asked Fuggins "if there was anything illegal in the vehicle," to which Fuggins replied, "Just a little bit of marijuana." Deputy Booth-Mahood searched the car and lifted the center console, which was loose. A silver magnum revolver and an orange container labeled medical marijuana fell out of the console and into the rear passenger seat. The gun was unregistered and loaded with six rounds of ammunition. The deputies did not find any marijuana in the car.

B. *The Trial Court Denies Fuggins's Motion To Suppress, and The Jury Convicts Fuggins*

The People charged Fuggins with possession of a firearm by a person convicted of one of several enumerated misdemeanor offenses (Pen. Code, § 29805),[1] carrying a loaded firearm in a public place or street without being the registered owner of the firearm (§ 25850, subd. (a)), and unlawful possession of ammunition (§ 30305, subd. (a)(1)). Fuggins filed a motion to suppress evidence of the gun.

At the preliminary hearing, Deputy Booth-Mahood testified about the traffic stop and the search of Fuggins's car. One of Fuggins's cousins testified that Fuggins had been wearing his seatbelt and that no one in the car had been smoking marijuana. The court credited the deputy's testimony, denied the motion to suppress, and held Fuggins to answer. Fuggins filed a motion to dismiss under section 995, which the court denied.

Fuggins admitted he had a prior misdemeanor conviction that prevented him from owning, possessing, or controlling a firearm or ammunition. The jury convicted Fuggins on all counts, but did not make a finding on the conviction for carrying a loaded firearm in a public place that Fuggins was not the registered owner of the firearm. Therefore, the trial court reduced the conviction for violating section 25850, subdivision (a), to a conviction for violating section 25850, subdivision (c)(7), a misdemeanor.

On Fuggins's convictions for unlawful possession of a firearm and unlawful possession of ammunition, the court

---

[1] Undesignated statutory references are to the Penal Code.

suspended imposition of sentence and placed Fuggins on probation for five years. On Fuggins's misdemeanor conviction, the court sentenced Fuggins to four days in jail, with credit for time served. Fuggins timely appealed.

DISCUSSION

A. *Standard of Review*

"'The Fourth Amendment of the federal Constitution requires state and federal courts to exclude evidence obtained from unreasonable government searches and seizures.'" (*People v. Fews* (2018) 27 Cal.App.5th 553, 559 (*Fews*).) A defendant may move to suppress evidence on the ground that "[t]he search or seizure without a warrant was unreasonable." (§ 1538.5, subd. (a)(1)(A).) "'"A warrantless search is presumed to be unreasonable, and the prosecution bears the burden of demonstrating a legal justification for the search. [Citation.] 'The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment.'"'" (*People v. Johnson* (2018) 21 Cal.App.5th 1026, 1032; see *People v. Macabeo* (2016) 1 Cal.5th 1206, 1212; *People v. Suff* (2014) 58 Cal.4th 1013, 1053.)

B. *The Automobile Exception to the Warrant Requirement*

"Under the so-called automobile exception officers may search a vehicle without a warrant if it 'is readily mobile and probable cause exists to believe it contains contraband' or evidence of criminal activity." (*People v. Johnson*, *supra*, 21 Cal.App.5th at p. 1034; see *Collins v. Virginia* (2018) ___ U.S. ___, ___, 138 S.Ct. 1663, 1669.) "[P]robable cause to search exists 'where the known facts and circumstances are sufficient to warrant a [person] of reasonable prudence in the belief that contraband or evidence of a crime will be found.'" (*People v. Waxler* (2014) 224 Cal.App.4th 712, 718 (*Waxler*); see *Ornelas v. United States* (1996) 517 U.S. 690, 696.) "'If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.'" (*Robey v. Superior Court* (2013) 56 Cal.4th 1218, 1230.)

C. *There Was Probable Cause To Search Fuggins's Car Under the Automobile Exception*

Fuggins concedes that, prior to the passage of Proposition 64 in 2016, California courts routinely held that the smell of burnt marijuana and the observation of marijuana gave officers probable cause to search an automobile for marijuana. For example, in *Waxler*, *supra*, 224 Cal.App.4th 712 the court held that the odor of burnt marijuana coming from a truck and the sight of marijuana in a pipe inside the truck gave officers probable cause to search the vehicle even though, at the time, the defendant could possess marijuana under the Compassionate Use Act of 1996, Health and Safety Code section 11362.5. (*Waxler*,

supra, 224 Cal.App.4th at pp. 723-724.) Similarly, in *People v. Strasburg* (2007) 148 Cal.App.4th 1052 (*Strasburg*) the court held that a police officer had probable cause to search a car based on the smell of marijuana and the defendant's admission he had smoked marijuana, even though the defendant presented a medical marijuana card to the officer. (*Id.* at p. 1057; see *Robey v. Superior Court*, *supra*, 56 Cal.4th at p. 1240 ["a distinctive odor" or "the smell of contraband" can be "sufficient to establish the probable cause necessary . . . to conduct a search or seizure under the automobile or exigent circumstances exception to the warrant requirement"]; *People v. Dey* (2000) 84 Cal.App.4th 1318, 1320, 1322 ["a person of ordinary caution would conscientiously entertain a strong suspicion that even if defendant makes only personal use of the marijuana found in [the passenger compartment], he might stash additional quantities for future use in other parts of the vehicle, including the trunk," and "[s]uch a suspicion is sufficient for a search of the trunk"].)

Fuggins also acknowledges that the court in *Fews*, *supra*, 27 Cal.App.5th 553 recently held the rule of *Strasburg* and *Waxler* applies even after the passage of Proposition 64, which legalized possessing up to 28.5 grams of cannabis by persons 21 years of age or older. (*Fews*, *supra*, 27 Cal.App.5th at pp. 562-564; see *People v. Perry* (2019) 32 Cal.App.5th ___, ___ [2019 WL 987915, at p. 1].) In *Fews* police officers detained the defendants after their car abruptly stopped in front of the officers' patrol car, which the officers believed the defendants did to avoid a traffic stop. (*Fews, supra*, 27 Cal.App.5th at pp. 556-557.) The driver of the car got out quickly, and the officers observed the driver reach into the car and a passenger making movements around the passenger compartment. One of the officers smelled burnt

marijuana coming from the driver and asked the driver if there was marijuana in the cigar he was smoking. The driver said there was. The officer searched the vehicle and patted down the passenger, which revealed a loaded semiautomatic gun. (*Id.* at p. 558.) The defendant in *Fews* made the same argument Fuggins makes here—that because he was arrested after the approval of Proposition 64, the police did not have probable cause to search the car and, in the passenger's case, reasonable suspicion to pat down the passenger.

Rejecting this argument, the court stated: "The continuing regulation of marijuana leads us to believe that *Strasburg* and *Waxler* still permit law enforcement officers to conduct a reasonable search to determine whether the subject of the investigation is adhering to the various statutory limitations on possession and use, and whether the vehicle contains contraband or evidence of a crime." (*Fews*, *supra*, 27 Cal.App.5th at p. 562.)[2] The court held that the scent of marijuana coming from the car, as well as the driver's admission there was marijuana in his cigar, created "a fair probability that a search of the [car] might yield additional contraband or evidence." (*Fews*, at p. 563.) The court stated: "The possibility of an innocent explanation for the possession of marijuana 'does not deprive the officer of the

---

[2] Indeed, as the court in *Fews* recognized, it remains unlawful to possess, transport, or give away marijuana in excess of the statutory limits, to cultivate cannabis plants in excess of statutory limits and in violation of local ordinances, and to engage in unlicensed commercial cannabis activity. (See Health & Saf. Code, §§ 11362.1, subd. (a), 11362.2, subd. (a), 11362.3, subd. (a), 11362.45, subd. (a).)

capacity to entertain a reasonable suspicion of criminal conduct.'" (*Fews*, at p. 561.)

Fuggins argues: "To the extent that the *Fews* opinion suggests that the odor of marijuana was enough to justify probable cause in a 2017 search for evidence of the crime of unlawful smoking while driving, it is wrongly decided." The court in *Fews* did state, in rejecting the defendant's argument "that marijuana is no longer contraband in California after Proposition 64,"[3] that the evidence in that case "of the smell of 'recently burned' marijuana and the half-burnt cigar containing marijuana supported a reasonable inference that [the driver] was illegally driving under the influence of marijuana, or, at the very least, driving while in possession of an open container of marijuana." (*Fews*, *supra*, 27 Cal.App.5th at p. 563.) But Fuggins's attack on *Fews* nevertheless misses the mark. The court in *Fews* did not hold that the odor of marijuana was enough to give an officer probable cause to search a car. The court held the officer had probable cause because of "the odor of marijuana emanating from" the car, "as well as [the driver's] admission that there was marijuana in his half-burnt cigar." (*Ibid.*) And, in any event, this case does not involve an allegation or evidence of driving while smoking marijuana.

---

[3] Health and Safety Code section 11362.1, subdivision (c), added by Proposition 64, provides that "[c]annabis and cannabis products involved in any way with conduct deemed lawful by this section are not contraband nor subject to seizure, and no conduct deemed lawful by this section shall constitute the basis for detention, search, or arrest."

Fuggins argues his case is distinguishable from *Fews*, *Waxler*, and *Strasburg* because what Deputy Booth-Mahood "saw, heard and smelled was critically less than what the officers observed" in those cases. Fuggins contends that in *Strasburg* (1) the officer smelled marijuana, and (2) the driver admitted he had been smoking marijuana; in *Waxler* the officer (1) smelled marijuana, and (2) saw a marijuana pipe; and in *Fews* (1) the officer smelled the odor of marijuana, and (2) the driver stated his cigar contained marijuana. It is true, as Fuggins emphasizes, Deputy Booth-Mahood did not see any marijuana or drug paraphernalia before he searched Fuggins's car. But he (1) smelled the odor of marijuana coming from the car, and (2) Fuggins told the officer he had some amount of marijuana that may not have been legal. There is no material difference between the facts and circumstances facing Deputy Booth-Mahood and those facing the officers in *Fews*, *Waxler*, and *Strasburg*. Deputy Booth-Mahood may not have seen marijuana in the car, but he smelled it coming from the car, he heard a statement it was in the car, and given Fuggins's admission in response to the deputy's question, he reasonably believed there could have been an illegal amount of it in the car. That was enough to give him probable cause to search the car. (See *People v. Avila* (1997) 58 Cal.App.4th 1069, 1075 ["[t]he Fourth Amendment was not designed to protect a defendant from his own candor"]; *U.S. v. McCarty* (8th Cir. 2010) 612 F.3d 1020, 1026 [defendant's admission "there was marijuana in his car . . . established probable cause to search for the marijuana"]; *U.S. v. Bradford* (10th Cir. 2005) 423 F.3d 1149, 1159 [defendant's admission to an officer that she had "a marijuana pipe and small bag of

marijuana in the car . . . gave rise to probable cause there would be contraband in the trunk"].)

Finally, Fuggins contends his statement, in response to Deputy Booth-Mahood's question whether he had anything illegal in his car, that he had "a little marijuana," was too ambiguous "in the post-Proposition 64 era" to support a finding of probable cause. But there was no ambiguity in Fuggins's statement he had marijuana in the car; the only ambiguity in Fuggins's statement was how much marijuana he had in this car. Deputy Booth-Mahood had probable cause to search the car to determine whether the amount Fuggins admittedly had was legal. (See *Waxler*, *supra*, 224 Cal.App.4th at p. 725 [the "automobile exception is not limited to situations where the officer smells or sees more than 28.5 grams of marijuana in the vehicle"].)

DISPOSITION

The judgment is affirmed.

SEGAL, J.

We concur:

PERLUSS, P. J.

FEUER, J.